

**MOTION UNDER 28 U.S.C. § 2255 TO VACATE, SET ASIDE, OR CORRECT  
SENTENCE BY A PERSON IN FEDERAL CUSTODY**

United States District Court		District <u>EASTERN DISTRICT OF NEW YORK</u>	
Name: <u>AMILCAR GOMEZ</u>		Docket or Case No.: <u>06-613(S-2)(S-J)</u>	
Place of Confinement: <u>U.S.P. COLEMAN II, P.O. BOX 1034 <sup>33521</sup> COLEMAN FL</u>		Prisoner No.: <u>64072-053</u>	
UNITED STATES OF AMERICA		Movant (include name under which convicted) <u>AMILCAR GOMEZ</u>	

v.

**MOTION**

1. (a) Name and location of court that entered the judgment of conviction you are challenging: UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK, 225 CADMAN PLAZA EAST, Brooklyn NY 11201  
 (b) Criminal docket or case number (if you know): 06-613(S-2)(S-J)
2. (a) Date of the judgment of conviction (if you know): MARCH 23, 2010  
 (b) Date of sentencing: MARCH 10, 2009
3. Length of sentence: 365 MONTHS FOR COUNT ONE, 60 MONTHS COUNT TWO, LIFE COUNT FIVE
4. Nature of crime (all counts):  
RACKETEERING CONSPIRACY (18 U.S.C. § 1962)  
CARRYING A FIREARM DURING AND IN RELATION TO A CRIME OF VIOLENCE  
MURDER IN THE AID OF RACKETEERING (18 U.S.C. § 1959(a)(1))  
(18 U.S.C. § 924(c))
5. (a) What was your plea? (Check one)  
 (1) Not guilty ☒ (2) Guilty ☐ (3) Nolo contendere (no contest) ☐  
 (b) If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, what did you plead guilty to and what did you plead not guilty to?  
 \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_
6. If you went to trial, what kind of trial did you have? (Check one) Jury ☒ Judge only ☐
7. Did you testify at either a pretrial hearing, trial or post-trial hearing? Yes ☐ No ☒

8. Did you appeal from the judgment of conviction? Yes ☒ No ☐

9. If you did appeal, answer the following:

- (a) Name of court: UNITED STATES COURT OF APPEALS SECOND CIRCUIT
- (b) Docket or case number (if you know): 10-1095
- (c) Result: AFFIRMED WITH LEAVE TO FILE § 2255
- (d) Date of result (if you know): 1/15/13
- (e) Citation to the case (if you know): 705 F.3d 68 (2d Cir. 2013)
- (f) Grounds raised: 1) VIOLATION OF DEFENDANT'S RIGHT TO TESTIFY (STRUCTURAL ERROR)  
2) INEFFECTIVE ASSISTANCE OF COUNSEL (RT TO TESTIFY)  
3) VIOLATION OF RIGHT TO PUBLIC TRIAL (STRUCTURAL ERROR)  
4) INEFFECTIVE ASSISTANCE OF COUNSEL (PUBLIC TRIAL)  
5) BREACH OF PROFFER AGREEMENT  
6) DENIAL OF § 5 K1.1 (BAD FAITH)  
7) CUMULATIVE ERROR WARRANTED REVERSAL

(g) Did you file a petition for certiorari in the United States Supreme Court? Yes ☒ No ☐

If "Yes," answer the following:

- (1) Docket or case number (if you know): 12-1212
- (2) Result: CERT. DENIED
- (3) Date of result (if you know): 10/7/13
- (4) Citation to the case (if you know): 134 S. CT. 61 (U.S. 2013)
- (5) Grounds raised: 1) VIOLATION OF PUBLIC TRIAL  
2) INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE OF COUNSEL'S FAILURE TO OBJECT TO CLOSING OF COURTROOM TO FAMILY FOR ENTIRETY OF JURY SELECTION

10. Other than the direct appeals listed above, have you previously filed any other motions, petitions, or applications concerning this judgment of conviction in any court?

Yes ☐ No ☒

11. If your answer to Question 10 was "Yes," give the following information:

- (a) (1) Name of court: \_\_\_\_\_
- (2) Docket or case number (if you know): \_\_\_\_\_
- (3) Date of filing (if you know): \_\_\_\_\_
- (4) Nature of the proceeding: \_\_\_\_\_

(5) Grounds raised: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(6) Did you receive a hearing where evidence was given on your motion, petition, application?

Yes ☐ No ☐

(7) Result: \_\_\_\_\_

(8) Date of result (if you know): \_\_\_\_\_

(b) If you filed any second motion, petition, or application, give the same information:

(1) Name of court: \_\_\_\_\_

(2) Docket or case number (if you know): \_\_\_\_\_

(3) Date of filing (if you know): \_\_\_\_\_

(4) Nature of the proceeding: \_\_\_\_\_

(5) Grounds raised: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

(6) Did you receive a hearing where evidence was given on your motion, petition, or application?

Yes ☐ No ☐

(7) Result: \_\_\_\_\_

(8) Date of result (if you know): \_\_\_\_\_

(c) Did you appeal to a federal appellate court having jurisdiction the action taken on your motion, petition, or application?

(1) First petition: Yes ☐ No ☐

(2) Second petition: Yes ☐ No ☐

(d) If you did not appeal from the action on any motion, petition, or application, explain briefly why you did not: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

GROUND ONE: INEFFECTIVE ASSISTANCE OF COUNSEL

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

DEFENSE COUNSEL FAILED TO CONDUCT DISCOVERY AS TO STATEMENTS ALLEGEDLY MADE BY GOMEZ AND FAILED TO MOVE TO SUPPRESS THOSE STATEMENTS. GOMEZ WAS INTERVIEWED WITHOUT COUNSEL DESPITE REQUESTING COUNSEL AND WAS THREATENED WITH DEPORTATION SHOULD HE NOT MAKE STATEMENTS AND ASSIST IMMIGRATION AGENTS AND PROSECUTING AUTHORITY. DEFENSE COUNSEL FAILED TO MOVE FOR SUPPRESSION.

(b) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

EVIDENCE OF DEPORTATION THREAT WAS NOT ON RECORD NOT WAS DENIAL OF COUNSEL

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

**GROUND TWO:**

*DEFENSE COUNSEL FAILED TO PROPERLY INFORM GOMEZ OF HIS RIGHT TO TESTIFY*

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

*TRIAL COUNSEL WAS INEFFECTIVE. GOMEZ TOLD TRIAL COUNSEL HE WANTED TO TESTIFY REPEATEDLY AND COUNSEL DID NOT TELL GOMEZ THE DECISION TO TESTIFY WAS GOMEZ'S TO MAKE. GOMEZ WAS NOT AFFORDED HIS CONSTITUTIONAL RIGHT TO TESTIFY. TRIAL COUNSEL*

(b) Direct Appeal of Ground Two:

*SWEARS TO THIS.*

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☒ No ☐

*Leave Granted to File 28 U.S.C. 2255*

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

**(c) Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

**GROUND THREE:** DEFENSE COUNSEL WAS INEFFECTIVE FOR FAILING TO INTERVIEW WITNESS, INCLUDING

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): THE WITHIN SORIAND

WITNESS SORIAND STABBED A RIVAL GANG MEMBER TO DEATH. GOMEZ WAS CHARGED WITH THIS MURDER, AND SORIAND DESIRED TO TESTIFY THAT →

GOMEZ HAD NOTHING TO DO WITH THE  
KILLING. DEFENSE COUNSEL FAILED  
TO INTERVIEW SORIANO AND  
FAILED TO CALL HIM TO TESTIFY.  
DEFENSE COUNSEL DID NOT INTERVIEW  
ANY WITNESS.

(b) **Direct Appeal of Ground Three:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

INFORMATION NOT ON THE RECORD

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

**GROUND FOUR:** GOMEZ IS ACTUALLY INNOCENT  
OF THE CRIMES CHARGED

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

NO GUN WAS EVER USED  
BY GOMEZ IN FURTHERANCE OF  
THE VIOLENCE CHARGED; GOMEZ  
AS TESTIFIED TO BY  
SORIANO HAD NOTHING TO  
DO WITH THE KILLING OF A  
RIUAL GANG MEMBER.

(b) **Direct Appeal of Ground Four:**

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

SORIANO'S TESTIMONY  
NOT ON THE RECORD

(c) **Post-Conviction Proceedings:**

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

12. For this motion, state every ground on which you claim that you are being held in violation of the Constitution, laws, or treaties of the United States. Attach additional pages if you have more than four grounds. State the facts supporting each ground.

**GROUND ONE:** FIVE INEFFECTIVE ASSISTANCE OF COUNSEL

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

TRIAL COUNSEL FAILED TO FILE  
DISCOVERY MOTION WITH RESPECT TO  
GOMEZ'S CIVIL DEPORTATION  
PROCEEDING DURING WHICH HE WAS  
THREATENED WITH DEPORTATION UNLESS  
HE COOPERATED WITH THE PROSECUTION.  
THE GOVERNMENT VIOLATED RULE 16  
IN FAILING TO TURN OVER THE TAPE  
OF THE DEPORTATION PROCEEDING.

(b) Direct Appeal of Ground One:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

NOT ON RECORD.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

GROUND TWO:

SIX INEFFECTIVE ASSISTANCE  
OF COUNSEL

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.): \_\_\_\_\_

COUNSEL WAS INEFFECTIVE  
FOR FAILING TO CROSS-EXAMINE  
THE WITNESSES AGAINST GOMEZ

(b) Direct Appeal of Ground Two:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why: \_\_\_\_\_

REASONS FOR NOT CROSS  
EXAMINING NOT ON RECORD

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition: \_\_\_\_\_

Name and location of the court where the motion or petition was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

SEVEN INEFFECTIVE ASSISTANCE  
GROUND THREE: OF COUNSEL

(a) Supporting facts (Do not argue or cite law. Just state the specific facts that support your claim.):

COUNSEL FAILED TO DEMAND  
BIOLOGICAL EVIDENCE BE TESTED  
GOMEZ NOW MOVES pursuant to  
18 U.S.C. § 3600(a)

For an Order For Inspection  
AND ANALYSIS OF BIOLOGICAL  
EVIDENCE.

(b) Direct Appeal of Ground Three:

(1) If you appealed from the judgment of conviction, did you raise this issue?

Yes ☐ No ☒

(2) If you did not raise this issue in your direct appeal, explain why:

Counsel's Reasons for not moving  
not on record.

(c) Post-Conviction Proceedings:

(1) Did you raise this issue in any post-conviction motion, petition, or application?

Yes ☐ No ☒

(2) If your answer to Question (c)(1) is "Yes," state:

Type of motion or petition:

Name and location of the court where the motion or petition was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available):

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed:

Docket or case number (if you know):

Date of the court's decision:

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(3) Did you receive a hearing on your motion, petition, or application?

Yes ☐ No ☐

(4) Did you appeal from the denial of your motion, petition, or application?

Yes ☐ No ☐

(5) If your answer to Question (c)(4) is "Yes," did you raise this issue in the appeal?

Yes ☐ No ☐

(6) If your answer to Question (c)(4) is "Yes," state:

Name and location of the court where the appeal was filed: \_\_\_\_\_

Docket or case number (if you know): \_\_\_\_\_

Date of the court's decision: \_\_\_\_\_

Result (attach a copy of the court's opinion or order, if available): \_\_\_\_\_

(7) If your answer to Question (c)(4) or Question (c)(5) is "No," explain why you did not appeal or raise this issue: \_\_\_\_\_

13. Is there any ground in this motion that you have not previously presented in some federal court? If so, which ground or grounds have not been presented, and state your reasons for not presenting them: \_\_\_\_\_

1) MIRANDA VIOLATION Ineffective assistance  
COERCIVE INTERROGATION NOT ON RECORD

2) WITNESS EXCULPATORY testimony. Ineffective  
Assistance NOT ON RECORD

3) Failure to conduct DISCOVERY OF CIVIL Deportation  
NOT ON RECORD, Ineffective Assistance & Counsel

14. Do you have any motion, petition, or appeal now pending (filed and not decided yet) in any court for the judgment you are challenging? Yes ☐ No ☒

If "Yes," state the name and location of the court, the docket or case number, the type of proceeding, and the issues raised. \_\_\_\_\_

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment you are challenging:

(a) At preliminary hearing: \_\_\_\_\_

(b) At arraignment and plea: \_\_\_\_\_

(c) At trial: SCOTT AVSTER, ESQ.  
65 HIGHVIEW DRIVE, CARMEL, NEW YORK 10512

(d) At sentencing: \_\_\_\_\_

(e) On appeal: EDWARD IRIZARRY, ESQ.  
260 MADISON AVENUE, NEW YORK, NY 10016

(f) In any post-conviction proceeding: \_\_\_\_\_

(g) On appeal from any ruling against you in a post-conviction proceeding: \_\_\_\_\_

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time? Yes ☒ No ☐

17. Do you have any future sentence to serve after you complete the sentence for the judgment that you are challenging? Yes ☐ No ☒

(a) If so, give name and location of court that imposed the other sentence you will serve in the future: \_\_\_\_\_

(b) Give the date the other sentence was imposed: \_\_\_\_\_

(c) Give the length of the other sentence: \_\_\_\_\_

(d) Have you filed, or do you plan to file, any motion, petition, or application that challenges the judgment or sentence to be served in the future? Yes ☐ No ☐

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Therefore, movant asks that the Court grant the following relief: VACATE GOMEZ'S CONVICTION  
SENTENCE AND FINES ON ALL THREE COUNTS IN THE  
SUPRECEDING INDICTMENT OR FOR AN EVIDENTIARY HEARING  
or any other relief to which movant may be entitled. AND COMPEL THE GOVERNMENT TO  
PRODUCE FOR INSPECTION AND  
ANALYSIS ALL BIOLOGICAL EVIDENCE  
RECOVERED.

  
Signature of Attorney (if any)

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct and that this Motion Under 28 U.S.C. § 2255 was placed in the prison mailing system on \_\_\_\_\_  
\_\_\_\_\_. (month, date, year).

Executed (signed) on 9/19/14 (date).

Amilcar Gomez  
Signature of Movant

If the person signing is not movant, state relationship to movant and explain why movant is not signing this motion. \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_